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Part VIII

**Environmental
Protection Agency**

40 CFR Part 280

**Underground Storage Tanks Containing
Petroleum; Financial Responsibility
Requirements; Interim Final Rule**

**ENVIRONMENTAL PROTECTION
AGENCY****40 CFR Part 280****[FRL-3761-8]****Underground Storage Tanks
Containing Petroleum; Financial
Responsibility Requirements****AGENCY:** Environmental Protection
Agency (EPA).**ACTION:** Interim final rule with request
for comments.

SUMMARY: The Environmental Protection Agency (EPA) is today publishing an interim final rule amending the financial responsibility requirements for underground storage tanks (USTs) containing petroleum that appeared in the Federal Register on October 26, 1988 (53 FR 43322). Specifically, EPA is modifying the compliance dates under 40 CFR 280.91(c). Under the modification, all petroleum marketing firms owning 13-99 USTs at more than one facility will be required to comply with the requirements of 40 CFR part 280, subpart H—Financial Responsibility—as of April 26, 1991. This modification extends the deadline from the previous date of April 26, 1990. The amendments published today will provide additional time for the development of financial assurance mechanisms (especially, state assurance funds) to enable this group to comply.

DATES: The amendments to 40 CFR part 280 contained in this rulemaking are effective May 2, 1990. EPA will accept comments on today's rulemaking on or before June 1, 1990.

ADDRESSES: Comments may be mailed to the Docket Clerk (Docket No. UST-3), Office of Underground Storage Tanks (OS-400), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Comments received by EPA may be inspected in the public docket, located in room 2427 (Mall), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (202) 382-3000 in Washington, DC.

SUPPLEMENTARY INFORMATION: On October 26, 1988, EPA promulgated financial responsibility requirements applicable to owners and operators of underground storage tanks (USTs) containing petroleum (53 FR 43322). In the final rule, EPA established a phased schedule of compliance for owners and operators of petroleum USTs. Petroleum

marketing firms with 13-99 USTs at more than one facility were required to comply with the financial responsibility requirements by April 26, 1990. The principal reason for adopting the phased compliance approach was to allow providers (including private insurance companies and states intending to establish state assurance funds) of financial assurance mechanisms the time necessary to develop new policies and programs or to conform their policies and programs with EPA requirements. (See 53 FR 43324.)

Since October 1988, EPA has monitored the development of financial assurance markets, especially (1) insurance for corrective action and third party liability and (2) state assurance funds, to determine whether financial assurance mechanisms were becoming available to satisfy the needs of the regulated community. Based on this ongoing review, EPA believes that tank owners required to comply by April 26, 1990, need additional time to meet insurers' standards for coverage. Also, states need additional time to develop state assurance funds, to submit them to EPA for review and approval as financial assurance mechanisms, and to make any modifications necessary for approval. Therefore, EPA is now extending the compliance date for owners and operators of 13-99 USTs at more than one facility from April 26, 1990 to April 26, 1991. The Agency is hopeful that this one year extension will provide adequate time for tank owners and operators to obtain assurance.

I. Authority

These regulations are issued under the authority of sections 2002, 9001, 9002, 9003, 9004, 9005, 9006, 9007, 9009 of the Solid Waste Disposal Act, as amended. The principal amendments of this Act have been under the Resource Conservation and Recovery Act of 1976, the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98-616) and the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499) (42 U.S.C. 6921, 6991, 6991(a), 6991(b), 6991(c), 6991(d), 6991(e), 6991(f), and 6991(h)).

II. Background

When devising the phased compliance approach, the Agency wanted to achieve the best balance between the need to ensure financial capability for addressing UST releases and the necessary time for owners and operators to obtain assurance mechanisms. The Agency attempted to establish compliance dates which were as early as possible, considering the type of assurance different types of

facilities were likely to obtain. Petroleum marketers owning or operating 1,000 or more USTs and non-marketers with more than \$20 million in tangible net worth were required to comply by January 24, 1989, based primarily on their ability to qualify for self-insurance. Petroleum marketers with 100-999 USTs were required to comply by October 26, 1989.

These marketers were estimated to be relatively more likely to be able to obtain insurance; some of them were also expected to qualify as self-insurers. Petroleum marketers owning 13-99 USTs at more than one facility were required to comply by April 26, 1990. These marketers were estimated to be less likely to be able to obtain insurance than members of the October 26, 1989 compliance group. Petroleum marketers owning or operating fewer than 13 USTs (or owning or operating a single facility with fewer than 100 USTs), and UST owners and operators that were not petroleum marketers (including local government entities) were required to comply by October 26, 1990. This group was expected to rely primarily on state assurance funds for compliance.

As EPA has been monitoring the development of financial assurance mechanisms, and as the Agency has learned more about the way insurers operate in the UST insurance market, EPA believes that our original compliance date for this group (marketers owning 13-99 USTs at more than one facility) has to be extended based on new information. When devising the original phased compliance schedule, the Agency expected that members of this compliance group would rely primarily on insurance and that 18 months from promulgation of the final financial responsibility rule would provide adequate time for insurers to process applications and for owners and operators to upgrade their USTs to meet insurers' requirements. Since promulgation of the final rule, however, we have learned that tank owners and operators require additional time to comply with conditions imposed by the insurance industry. Some of these conditions include having tanks newer than 15 years of age, a clean site, a reliable method of leak detection, etc. For example, some insurers have informed EPA that they have rejected UST coverage applications because of existing contamination, poor tank management, and inadequate leak detection monitoring. Many members of this compliance group may not be able to meet these standards by April 26, 1990. The Agency has collected information from the major providers of

UST insurance which indicated that less than 2% of the USTs in the April 26, 1990 compliance group were covered by UST insurance as of March 1, 1990. Because of the still limited availability of insurance, EPA does not believe this low compliance record is due to an unwillingness to comply with EPA's requirements. Rather, the Agency believes that this low compliance rate is a symptom of the problems of UST owners and operators in obtaining the requisite insurance.

In addition, the Agency believes that many more members of this compliance group must rely on state assurance funds to demonstrate compliance with the financial responsibility requirements, and not on insurance, than the Agency had originally projected. In order for owners and operators to rely on state assurance funds as compliance mechanisms, states must submit their funds to EPA. Although owners and operators are deemed to be in compliance when the state funds are submitted, the Agency has not considered submitted funds when determining availability, since the funds ultimately could be disapproved. To date, nine state assurance funds have been approved by EPA to serve as compliance mechanisms. Many more states have submitted funds and are in the process of making any modifications necessary for approval. The remaining states either have not submitted their funds to EPA or are in the process of developing assurance funds. Since many of the members of this compliance group must rely on state assurance funds to comply with the requirements, additional time is needed to allow states to develop, submit, and receive approval for the funds.

By extending the compliance date for this group to April 26, 1991, owners and operators will have additional time to meet insurers' standards and states will have additional time to submit their state assurance funds to EPA for approval so that owners and operators can use them to comply with the financial responsibility requirements.

EPA is not soliciting comments prior to the effective date of today's rulemaking. Under section 3(b) of the Administrative Procedures Act, 5 U.S.C. 553(b), the Agency may for good cause

omit notice and comment procedures. The Agency believes it has good cause to omit notice and comment procedures. When the Agency developed the phased schedule of compliance, it predicted that 18 months from promulgation of the final financial responsibility rule would provide adequate time for petroleum marketers owning 13-99 tanks to comply with the financial responsibility requirements. Since that time, the Agency has been monitoring the development of financial assurance mechanisms, particularly insurance and state assurance funds.

Through monitoring the insurance market, the Agency has learned that the UST insurance market is a volatile one. Because of this volatility, the Agency remained hopeful that it would not be necessary to revise the phased compliance schedule.

Recent developments in the UST insurance market demonstrate the volatility of this sector of the insurance industry. When the final financial responsibility regulation was promulgated in 1988, there were approximately three providers of UST insurance. Since that time additional insurers have entered the market while some insurers have left the market. For example, the Pollution Liability Insurance Association was a major provider of UST coverage, but withdrew from the market in 1989. The Environmental Protection Insurance Company, a new entrant into the UST insurance market, also withdrew in 1989. In February 1990, Petromark, a major provider of UST insurance, experienced serious financial difficulties and announced that it may not be able to continue providing UST insurance.

In addition to monitoring the development of the UST insurance market, the Agency is also monitoring development of state assurance funds. EPA is currently reviewing numerous state assurance funds to determine whether they are acceptable compliance mechanisms for owners and operators.

Because delays involved in proposing the amendments for public comment would prevent the promulgation prior to the originally scheduled compliance date, allowing the opportunity for public comment would result in unnecessary

closure of tanks and economic distress to the regulated community with no additional benefits to the environment and public health. EPA believes, therefore, that providing notice and comment on these amendments is impracticable and contrary to the public interest.

The Agency is, however, soliciting comments on today's regulatory amendments. Comments may be submitted on or before June 1, 1990.

Comments will be considered by the Agency and, if necessary, the Agency will issue a revised final rule changing today's amendments to respond to these comments.

List of Subjects in 40 CFR Part 280

Administrative practice and procedure, Environmental protection, Hazardous materials insurance, Oil pollution, Penalties, Petroleum, Reporting and recordkeeping requirements, State program approval, Surety bonds, Underground storage tanks, Water pollution control.

Dated: April 25, 1990.

William Reilly,
Administrator.

For the reasons set out in our preamble, part 280 of title 40 of the Code of Federal Regulations is amended as set forth below.

PART 280—TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

1. The authority citation for part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c), 6991(e), 6991(f), and 6991(h).

2. Section 280.91(c) is revised to read as follows:

§ 280.91 Compliance dates.

(c) All petroleum marketing firms owning 13-99 USTs at more than one facility; April 26, 1991.

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